In the

United States

Court of Appeals

For the Ninth Circuit

WYMAN W. GRAEBER, *Appellant*,

v.

MERLE E. SCHNECKLOTH, Superintendent of Washington State Penitentiary, at Walla Walla, Washington, *Appellee*.

No. 15346

APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE SAMUEL M. DRIVER, JUDGE

Brief of Appellee

JOHN J. O'CONNELL,
Attorney General,

MICHAEL R. ALFIERI,
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Attorneys for Appellee.

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APPELLEE'S STATEMENT OF THE CASE

This individual was charged with robbery on January 4, 1954. (Tr. 10 and 12.) He was convicted by a jury and sentenced to forty years imprisonment on July 12, 1954. (Tr. 10 and 13.) He appealed and the Supreme Court of the State of

Washington rendered a decision in *State v. Graeber*, 46 Wn. (2d) 602 (Appendix). He appealed to the Washington Supreme Court for a writ of *habeas corpus*. It was denied. He made a number of allegations in his petition which were all concerned with the merits of the case and which were answered in the opinion rendered by the Washington State Supreme Court. His only new allegations are the following:

I.

The allegations and documents of the respondent's return and answer are false and evasive, and he was kept in jail for eighty days without being charged. (Tr. 17.)

II.

He was not represented at the *habeas corpus* proceeding in the Washington Supreme Court. (Tr. 4.)

APPELLEE'S STATEMENT OF QUESTIONS INVOLVED

I.

Assuming as true that he was held eighty days without being charged for a crime, was the Washington trial court divested of jurisdiction?

II.

Was his denial to be represented by counsel at his *habeas corpus* proceeding a violation of due process?

ARGUMENT

I.

The appellant's first issue is apparently directed to the question of whether or not he was given the constitutional right to a speedy trial. We can assume his allegations as being true merely for the purpose of argument. However, nothing appears in the record of any factual basis which would substantiate such an allegation. It must be further pointed out that it is being raised for the first time in this court. This issue, however, has been answered by the Washington Supreme Court as follows:

In *State ex rel. James v. Superior Court*, 32 Wn. (2d) 451, 202 P. (2d) 250, 455, the court said:

> "The constitutional guaranty of a speedy trial is a privilege granted to the accused. If he demands a speedy trial, it must be granted to him. But, in order to take advantage of this *constitutional* guaranty, the accused must move. The question always arises, does he actually want a speedy trial. The right is there if he demands it, but his failure to so demand will constitute a waiver, on his part, of that right."

In *State v. Thompson*, 38 Wn. (2d) 774, 780-781, 232 P. (2d) 87, the court said:

> "The constitution of the state of Washington, amendment 10, gives to persons charged with crime the right 'to have a speedy, public trial.' This constitutional provision, in effect, has been implemented by legislative enactment of Rem. Rev. Stat., § 2312. The constitutional

provision has been referred to a number of times in decisions of this court and there are numerous decisions interpreting Rem. Rev. Stat., § 2312. A partial list of the decisions is as follows:

"*State v. Brodie*, 7 Wash. 442, 35 Pac. 137; *State v. Lewis*, 35 Wash. 261, 77 Pac. 198; *State v. Seright*, 48 Wash. 307, 93 Pac. 521; *State v. Parmeter*, 49 Wash. 435, 95 Pac. 1012; *State v. Alexander*, 65 Wash. 488, 118 Pac. 645; *State v. Miller*, 72 Wash. 154, 129 Pac. 1100; *State v.. Jones*, 80 Wash. 335, 141 Pac. 700; *State v. Nilnch*, 131 Wash. 344, 230 Pac. 129; *State v. Estes*, 151 Wash. 51, 274 Pac. 1053; *State v. Vukich*, 158 Wash. 362, 290 Pac. 992; *State v. Wingard*, 160 Wash. 132, 295 Pac. 116; *State v. Lester*, 161 Wash. 227, 296 Pac. 549; *State v. Thomas*, 1 Wn. (2d) 298, 95 P. (2d) 1036; *State v. Domanski*, 5 Wn. (2d) 686, 106 P. (2d) 591; *State v. Winchell*, 14 Wn. (2d) 420, 128 P. (2d) 643; *State v. Jenkins*, 19 Wn. (2d) 181, 142 P. (2d) 263; *State ex rel. James v. Superior Court*, 32 Wn. (2d) 451, 202 P. (2d) 250.

" * * * * * * * *

"Elaborating further on the above distinction between constitutional and statutory rights, the thought seems to have been that an accused may waive his *constitutional* rights to a speedy trial by inaction until the time of trial. But with reference to his *statutory* rights, an accused might wait until the time of trial without necessarily waiving those rights. In other words, an accused, even very belatedly, may urge seriously that the statute mandatorily

required dismissal by the court unless good cause is shown to the contrary. The latter thought suggests a duty on the part of the court to find, or a duty or a burden on the part of the prosecution to show, positively and affirmatively good cause justifying delay of the trial for more than sixty days. Absent the finding by the court or the showing by the prosecution, dismissal might be mandatory under the statute. Subsequent decisions of the court seem to have lost sight of this subtle distinction observed by Judge Ellis. In *State v. Estes*, 151 Wash. 51, 274 Pac. 1053, at page 54, a pertinent observation regarding Rem. Rev. Stat., § 2312, reads as follows:

"'. . . What is a speedy trial, must, of necessity, depend upon the facts and circumstances of the particular case, and something must be left to the discretion of the trial court in such a matter. . . .'"

Nothing in the record shows that this appellant ever demanded an earlier trial.

II.

The issue of the right to aid of counsel in application for a hearing of writ of *habeas corpus* has been answered by the annotation in 162 A. L. R. 922. The general rule on such a question seems to be the following:

"It has been uniformly held however, that the right to the aid of counsel does not exist in habeas corpus proceedings, and that in these proceedings the court may decline to appoint counsel to represent the petitioner on the hear-

ing and disposition of his petition for a writ of habeas corpus—the ground of the decision being that the right to the aid of counsel is confined to criminal proceedings and habeas corpus proceedings are not criminal in their nature, but are civil proceedings to insure the civil liberties of the citizens."

CONCLUSION

It is respectfully submitted that this appellant has been given the full extent of due process of law by the sovereign state of Washington. He was found guilty by a jury. He was represented by counsel. We have no doubt that he was guilty of the crime for which he is now incarcerated and that no Washington state constitutional right or United States constitutional rights have been violated in obtaining this conviction. It is respectfully submitted that there is no merit to any of the allegations that this appellant has made. We adopt *in toto* the opinion of the Washington State Supreme Court which reviewed this man's conviction on appeal and respectfully submit that this appeal be dismissed.

Respectfully submitted,

JOHN J. O'CONNELL,
Attorney General,

MICHAEL R. ALFIERI,
Assistant Attorney General,

Attorneys for Appellee.

APPENDIX

THE STATE OF WASHINGTON, *Respondent*, v. WYMAN GRAEBER *et al.*, *Appellants*.[1]

Appeal from judgments of the superior court for Snohomish county, No. 1560, Denney, J., entered July 12, 1954, upon a trial and convictions of robbery. Affirmed.

Wesley K. Duce, for appellants.

Arnold R. Zempel and *James Tynan*, for respondent.

OTT, J.—The defendants have appealed from judgments and sentences entered upon the verdict of a jury finding them guilty of the crime of robbery.

On October 7, 1953, two men entered the C & H Market, located on highway 99 in Snohomish county. They took from the shelves four bars of soap in special feature sale wrappers and brought them to the checker. One of the men exhibited a gun and told her it was a holdup. When she opened the cash register, they took the money therefrom and ran outside. The men were pursued by a store employee. While they were fleeing, shots were fired at the employee. A few days later, a lead slug was taken out of a telephone pole and identified as being from a .22 long cartridge.

The defendants were identified by the checker and by the store employee who had pursued them. Defendant Graeber was also identified by a woman customer who had been in the store. A soap wrapper,

similar to the ones containing the soap purchased by the defendants, was found near their trailer house.

Defendant McDonald admitted that he had owned an automatic pistol firing a .22 long cartridge, but stated that it had been pawned prior to the date of the robbery. An empty box that had contained cartridges of the same caliber was found behind the trailer house.

At the trial, each defendant testified in his own behalf. Defendant Graeber testified that he had suffered a leg injury and could not run, and that, therefore, he could not have been one of the men seen running from the store. He stated that he did not own a gun, and knew nothing of the robbery. He said that, on the day in question, he had gone to Everett after work and had not returned to the trailer house until after the time of the robbery.

Defendant McDonald, who was informed against as Thomas David Mayfield, Jr., said that he did not leave the trailer house all evening because he had a severe headache. Graeber was observed near the trailer house shortly after the robbery.

At the time of their arraignment, the court appointed an attorney to represent McDonald. Graeber desired to represent himself, but did state that he needed a lawyer to advise him on legal points. The lawyer appointed to represent McDonald was also appointed to represent Graeber. He does not represent them on this appeal.

Graeber took no part in the examination of the witnesses. The entire trial was conducted by the counsel appointed by the court on behalf of both defendants.

The jury returned a verdict of guilty as to each of the defendants. From the judgments and sentences based upon the verdict of the jury, the defendants have appealed.

[1] The appellants contend that they should have been granted a new trial because no witnesses were subpoenaed in their behalf. Graeber, acting as his own attorney, did not request that any witness be subpoenaed. The court found that the appellants' attorney, after interviewing all of the prospective witnesses suggested by the appellants, determined that their testimony would not be helpful to the defense. No continuance of the trial was requested upon this ground. The court did not abuse its discretion in denying the motion for a new trial upon this ground.

[2, 3] The appellants next contend that the attorney appointed by the court, who tried the case to the jury, was not satisfactory and did not properly defend them. Attorneys are presumed to have sufficient skill and learning to defend an accused adequately. No statutory or constitutional rights of the appellants were violated. *State v. Bradley*, 175 Wash. 481, 490, 27 P. (2d) 737 (1933), and cases cited; *State v. Bird*, 31 Wn. (2d) 777, 783, 198 P. (2d) 978 (1948). The record discloses that the appellants were adequately defended.

[4] The court permitted a trial amendment to the information by the addition of the words "and in the presence of." The entire clause, when amended, read: ". . . take from the person of *and in the presence of* Mary Stone." (Italics ours.) The amendment was permitted for the purpose of clarification of the method in which the crime was committed. The appellants were not prejudiced or in any manner mislead by the amendment. Rule of Pleading, Practice and Procedure 12(2), 34A Wn. (2d) 76. Further, at the time the motion to amend the information was made, the appellants and their attorney made no objection thereto, nor did they request a continuance. The court did not err in granting the motion to amend.

[5, 6] It is next contended that the trial court erred in not granting a new trial because the appellants were not arraigned upon the information as amended. The appellants had entered pleas of not guilty to the information before the trial amendment was granted. The trial amendment did not in any manner change the offense charged or the manner in which the wrongful act was accomplished. By such an amendment, the original pleas of not guilty were in full force and effect as to the amended information. Further, the right to enter pleas to the amended information was waived when, without objection upon that ground, the cause was tried on its merits. *State v. Garland*, 65 Wash. 666, 669, 118 Pac. 907 (1911), and cases cited.

The trial court did not abuse its discretion in denying the motion for a new trial upon any of the stated grounds. *State v. Tharp*, 42 Wn. (2d) 494, 256 P. (2d) 482 (1953).

During the trial, a gun was marked for identification as illustrative of the kind of weapon used by the appellants in the robbery. The state admitted that no guns were found when the appellants were apprehended. The appellants' attorney objected to the admission of the exhibit in evidence, on the ground of improper identification. The objection was sustained. Thereafter, the prosecuting attorney, in his cross-examination of appellant McDonald, made further inquiry concerning the weapon. The attorney for the appellants objected on the ground that the gun exhibit was immaterial and prejudicial. The court had previously sustained the objection as to its materiality, and orally instructed the jury, when it was presented a second time, to disregard any testimony with reference to the gun.

[7] The appellants do not assign error to the court's ruling, but contend on this appeal that the prosecuting attorney, in exhibiting the gun before the jury, was acting in bad faith, to the prejudice of appellants. The trial court ruled that the attorney for the state was acting in good faith in his attempt to have the exhibit admitted for illustrative purposes. The record discloses no error in this ruling.

[8-10] The appellants next contend that the court should have instructed the jury concerning

the defense of alibi. This contention is without merit for the following reasons: (1) There was insufficient evidence to sustain such a defense, therefore it was rightfully withheld from the jury. *State v. Lathrop*, 112 Wash. 560, 562, 192 Pac. 950 (1920). (2) No such instruction was requested by the appellants. *State v. Lathrop, supra*, p. 562. (3) Since no exceptions were taken to the instructions, they became the law of the case. *Irvin v. Spear*, 41 Wn. (2d) 224, 227, 248 P. (2d) 404 (1952), and cases cited.

[11] Finally, appellant McDonald contends that he was prejudiced because the original information stated his name as Thomas David Mayfield, Jr., which name was, in fact, an alias, and that, at the time of his arraignment, he informed the court that his true name was Bluford E. McDonald. A record of his true name was entered in the minutes of the court, as provided by RCW 10.40.050 [*cf.* Rem. Rev. Stat., § 2097], and the prosecuting attorney moved for leave to amend the information to show the true name, Bluford E. McDonald. The motion was granted. At the time of trial, the only name appearing on the information was the alias. Throughout the trial, the appellant had been referred to as Mayfield. When he took the stand in his own behalf, he testified as follows:

"Q. What is your full name? A. Thomas David Mayfield. Q. It that your given name? A. No. Q. What is your other name, your real name? A. Bluford E. McDonald."

After the witness had testified, the court ordered the pleadings amended to comply with the proof. Rule of Pleading, Practice and Procedure 12(2), 34A Wn. (2d) 76. The jury was properly instructed with reference thereto. If appellant McDonald was prejudiced by this ruling, the matter was not brought to the court's attention at the time the ruling was made. The court did not err in this regard.